No. 96-243

In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The State of New Jersey has successfully implemented a regional land use plan which has long included transfer of development rights ("TDRs") as a critical component. This plan governs development within the New Jersey Pinelands, an area covering one-million acres in southeastern New Jersey (almost a quarter of the State) lying in the heart of the heavily developed Boston-Washington corridor. Through the use of TDRs and other components of the Pinelands plan, New Jersey has been able to manage growth within the Pinelands and thereby preserve the area's unique ecological, historical

and other resources, which include one of the largest pristine aquifers in the world as well as numerous rare plant and animal species.

Petitioner challenges the use of TDRs by the Tahoe Regional Planning Agency ("TRPA"), and claims that because TDRs do not provide a use for her property, TRPA has effected a "taking" of the property under Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992). These contentions are contrary to New Jersey's experience since 1981 in implementing a successful, nationally-recognized, regional TDR program within the Pinelands. That program provides remuneration to property owners whose lands are subject to development restrictions while simultaneously channeling development into appropriate areas.

Acceptance of petitioner's claims of a taking notwithstanding the existence of TDRs could undermine New Jersey's ongoing efforts to control development within the Pinelands in a fair and balanced manner through the use of TDRs and other land use techniques. It also could unnecessarily restrict the future use of TDRs to manage growth effectively in other regional areas.

New Jersey strongly supports TDRs because they can be used to protect natural resources and prevent unnecessary and economically wasteful suburban sprawl in unique environments such as the Pinelands, while also providing relief to property owners. New Jersey therefore urges this Court to confirm that TDRs are a valid land use technique fully consistent with takings jurisprudence.

SUMMARY OF ARGUMENT

TDRs are a valuable land use device and help offset the economic impacts of newly-enacted development restrictions by ensuring that property where development is limited will retain an economic value. In the New Jersey Pinelands,

TDRs have been successfully used since 1981 as part of a comprehensive land use plan. Since that plan was enacted, growth within the Pinelands has been confined largely to designated growth areas, towns and villages, and has not spread to fragile natural areas or farmlands. As a result, valuable resources within the Pinelands, including a vast reserve of pristine groundwater and numerous rare plant and animal species, have been protected from the impacts of suburban sprawl.

Under the Pinelands TDR system, TDRs are allocated to property owners within the most environmentally sensitive areas and can be sold for use by property owners within designated growth areas who wish to increase the level of permitted development. The TDR allocation system is predictable and a strong TDR market exists. Potential TDR buyers include private parties as well as a State Development Credit Bank and a County Development Credit Bank. As it has become established, the market for TDRs has increased.

Petitioner's takings claim assumes that TDRs do not constitute a property use, and, therefore, that her property has been taken as a result of development restrictions despite the existence of TDRs. However, pursuant to this Court's jurisprudence, a finding of a taking does not depend exclusively on whether development can occur on a property, but on whether as a result of governmental action, property value is substantially eliminated and property is forced to remain economically idle. Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1019 (1992). Properties to which TDRs have been allocated do not meet this test, and therefore have not been taken solely because development may not occur on them.

It is well established that States can enact new measures to address newly-recognized problems, even if the new measures reduce the value of property. In addition, this Court has held that property interests entitled to constitutional

protection are created under state law, rather than under the Constitution. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). TDRs are a new property interest created under State law which help reduce the economic impacts of newly-adopted police power measures intended to promote the public health, safety and welfare. As such, they are a valid and important means of providing remuneration to owners of property where development would result in the unacceptable destruction of important resources.

As the experience of the New Jersey Pinelands demonstrates, TDRs can be effectively used both to control growth and provide an economic use of property where development must be restricted. Limiting the use of this device would needlessly restrict ongoing efforts to manage development sensibly and fairly. Therefore, this Court should confirm that TDRs are an appropriate land use device which can provide a beneficial economic use of property.

ARGUMENT

I.

SINCE 1981, TDRS HAVE BEEN SUCCESSFULLY USED TO PROTECT THE NEW JERSEY PINELANDS AND CONTROL DEVELOPMENT IN A FAIR AND BALANCED MANNER.

The New Jersey Pinelands are a unique ecosystem which covers approximately one quarter of the State of New Jersey. The Pinelands provide habitat for more than 90 plant and animal species threatened with extinction in New Jersey, and the area has been designated as an International Biosphere Reserve by the United Nations. The Kirkwood-Cohansey Aquifer, which lies beneath the Pinelands, is one of the world's largest underground water supplies and contains some of the cleanest water in the United States. During the American Revolution, General George Washington's army

used the Pinelands for iron supplies and as a hiding place from the British Army.

In the 1970's, both New Jersey and the United States recognized that unless the Pinelands were protected from the effects of unmanaged growth, their unique natural and historic resources could be lost to the unrelenting development pressure being exerted within New Jersey at the heart of the heavily populated Boston-Washington corridor. Accordingly, in 1978, Congress established the Pinelands National Reserve as the first national reserve, pursuant to the National Parks and Recreation Act of 1978, Pub. Law 95-625. This federal legislation provided funding for the preparation of a comprehensive management plan ("CMP") for the Pinelands. See Gardner v. New Jersey Pinelands Commission, 125 N.J. 193, 198-201, 593 A. 2d 251, 253-55 (1991).

In 1979, New Jersey enacted the Pinelands Protection Act, N.J. Stat. Ann. §§13:18A-1 et seq., and established the Pinelands Commission as the land use planning entity for the Pinelands. N.J. Stat. Ann. §13:18A-4. In 1981, the Commission adopted a CMP which was approved by the United States Secretary of the Interior. See N.J.A.C. §§7:50-1 et seq.; Hovson's v. Secretary of the Interior, 519 F. Supp. 434, 437 (D. N.J. 1981), aff'd 711 F. 2d 1208 (3d Cir. 1983). The goals of the CMP include preservation of the essential character of the pinelands environment, protection of water quality, promotion of agriculture, discouragement of piecemeal development, encouragement of orderly growth within appropriate areas, and preservation of unique and significant Pinelands resources. N.J. Stat. Ann. §13:18A-9.

To facilitate the achievement of these goals, since 1981 the CMP has included a form of TDR known as a Pinelands Development Credit ("PDC"). PDCs are development rights that are allocated to environmentally sensitive sending areas and can be used to increase permitted development within

designated growth or receiving areas. Each transferred PDC transfers the right to build four homes.

The three current Pinelands sending areas represent the most fragile natural areas and the largest farming areas in the Pinelands. Property owners in those areas can sell PDCs if they place a deed restriction on their property ensuring its perpetual use for activities that are compatible with the land's ecology, such as agriculture, lumbering, or recreation. PDCs are valuable to property owners within growth areas as well as to owners of undersized lots on which a municipal zoning variance is required for construction. See Gardner, supra, 125 N.J. at 201-203, 593 A. 2d at 255-56; N.J.A.C. §§7:50-5.41 et seq.

PDCs can be sold to private parties, to the Pinelands Development Credit Bank, a State entity established in 1985,[1] or to a PDC bank established by Burlington County. PDCs also can be used as collateral for loans guaranteed by the State PDC Bank. N.J. Stat. Ann. §13:18A-30; N.J. Stat. Ann. §13:18A-38. In addition, to further facilitate the marketing of PDCs, the State PDC Bank maintains lists of potential PDC sellers and buyers for use by the public. Property owners can obtain a determination of their PDC allocation by submitting a one-page application form to the Pinelands Commission for a letter of interpretation. From 1981 through 1995, 4,232 transferable development rights were formally allocated through this system. See The Pinelands Development Credit Program (1996) at 21; N.J.A.C. §§7:50-4.72 et seq.; Gardner, supra, 125 N.J. at 203, 593 A. 2d at 256.

The Pinelands PDC market is active, and the PDC program has been highly effective in steering development into

[1] The current purchase price for PDCs acquired by the State PDC Bank is $12,600. N.J.A.C. §3:42-5.6. This price was calculated by the PDC Bank to be no more than 80% of the private market value of PDCs. N.J. Stat. Ann. §13:18A-34(g).

growth areas and in preventing development of environmentally sensitive areas. Moreover, activity in the PDC market has increased on a continuing basis as the PDC program has matured. See 28 N.J.R. 5 (1996).

From 1981 through 1995, 12,969 acres within the Pinelands were deed restricted as a result of the PDC program, 1,201 development rights (one development right equals one-quarter PDC) were the subject of initial purchases, and 421 additional development rights were the subject of resales or other secondary transfers. See Pinelands Development Credits Summary Report Through December 31, 1995 (June 1996). In addition, from 1981 to 1995, 86 percent of development within the Pinelands occurred within designated growth areas, and additional development was largely confined to Pinelands towns and villages. See Moore, New Jersey's Special Place: The Pinelands National Reserve, N.J. Lawyer, April 1995.

These results could not have been readily achieved without the TDR program. See Tripp and Dudek, Institutional Guidelines for Designing Successful Transferable Rights Programs, 6 Yale J. on Reg. 369, 378-382 (1989) (describing the success of the Pinelands TDR program and characterizing it as "the most ambitious, innovative, and geographically extensive TDR program in the country"). Thus, in the Pinelands, TDRs are a critical part of the land use process with an established track record and value.

II.

RESTRICTING THE USE OF TDRS WOULD UNNECESSARILY UNDERMINE ONGOING AND SUCCESSFUL EFFORTS TO MANAGE GROWTH AND PROTECT NATURAL RESOURCES.

TDRs have been successfully used in areas such as the New Jersey Pinelands to protect environmental and historical

resources, to prevent the loss of farmland to suburban sprawl, and to maintain water quality. TDRs allow those results to be achieved in a fair and balanced fashion by offsetting some of the economic effects that the new protective measures would otherwise have on property owners. See Penn Central Transportation Co v. New York, 438 U.S. 104, 114, 137 (1978); Gardner, supra, 125 N.J. at 213, 593 A. 2d at 261. Without the ability to use TDRs, entities such as the New Jersey Pinelands Commission could be forced to limit the implementation of new regulatory measures needed to address new problems and to promote the public health, safety and welfare.

This Court recognized many years ago that public entities can devise new land use methods to address newly-recognized problems, notwithstanding the fact that those methods may reduce the value of property to a significant degree. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In addition, this Court also has held that property interests entitled to constitutional protection are not created by the Constitution itself, but spring from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Given the states' police power, property owners cannot reasonably expect state law affecting property to remain static. Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1035 (1992)(Kennedy, J, concurring).

In the New Jersey Pinelands and elsewhere, TDRs are a property interest recently created under State law, and address a problem not generally recognized before the 1970's: the potential loss of unique natural or cultural resources to the increasing pressures of suburbanization or other development. Pursuant to this Court's jurisprudence, TDRs are a valid property interest that help adjust the benefits and burdens of recently enacted police power measures. Penn Central, supra, 438 U.S. at 125.

Petitioner claims that a TDR is not a "use" for her property, and that accordingly TRPA's actions have taken the property even though a TDR system exists. However, under this Court's precedents, property is not automatically taken whenever it cannot be developed; it is taken if it is stripped of substantially all economic value and forced to remain economically idle as a result of governmental action. Lucas, supra, 505 U.S. at 1019.

TDRs provide a property where development has been restricted with an important economic use by ensuring that the property will retain a beneficial economic value and that its owner will obtain remuneration. In addition, TDRs do not eliminate or abridge other important property rights, namely the rights of possession and exclusion. Accordingly, a taking cannot be based solely on a development restriction if a TDR system exists and helps to offset the economic impacts of the restriction by providing remuneration to affected property owners.

Restricting the use of TDRs on the basis of takings principles could seriously undermine recent efforts to encourage sensible development and to promote the public health, safety and welfare by preserving important natural and cultural resources. Restrictions on TDRs also could prevent State and local governments from fully exercising an authority that has long been recognized within traditional zoning law: the right to decide what property uses should be allowed in given areas. See Hadacheck v. Sebastian, 239 U.S. 394 (1915). Since the use of TDRs fully comports with takings jurisprudence, can help to achieve important public objectives and can provide a sensible method for remunerating owners of property subject to development restrictions, its use should be upheld by this Court.

CONCLUSION

For all of the foregoing reasons, the decision of the Ninth Circuit of the Court of Appeals should be affirmed

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